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Office of the United States Political
Adviser for Japan,
Tokyo.

MEMORANDUM OF CONVERSATION

Subject: Informal Discussions on the United States Standard Draft Treaty of Friendship, Commerce and Navigation

Participants: For the Ministry of Foreign Affairs:

Mr. Morio YUKAWA, Director, Economic Affairs Bureau
Mr. Kenichi OTABE, Vice Director, Economic Affairs Bureau
Mr. Haruki MORI, Chief, First Section, Economic Affairs Bureau
Mr. Masao OSATO, Chief, Fourth Section, Treaties Bureau
Mr. Takeshi KANEMATSU, Secretary, First Section, Economic Affairs Bureau
Mr. Kay MIYAGAWA, Secretary, First Section, Economic Affairs Bureau
Mr. Mikizo NAGAI, Chief, Sixth Section, Economic Affairs Bureau

For the Office of the United States Political Adviser, Japan:

Mr. Jules BASSIN, Legal Attache
Mr. Dudley G. SINGER, Commercial Attache
Mr. Robert W. ADAMS, Second Secretary

Place: Office of the Ministry of Foreign Affairs, Tokyo, Japan.

Date: Friday, April 11, 1952. FIFTEENTH INFORMAL MEETING

ARTICLE XXIII

Mr. Yukawa stated that Japan wished to reserve its position with respect to the application of the FCN Treaty to certain territorial areas mentioned in Article III of the Treaty of Peace with Japan (i.e., the Nansei Shoto, or Southwest Islands, south of 29 degrees north latitude, including the Ryukyu Islands and the Diato Islands; the Nampo Shoto south of Sofu Gan, including the Bonin Islands, Rosario Islands, and the Volcano Islands; and the Parece Vela and Marcus Islands).

Mr. Otabe added that the exact status of these islands was undetermined, and that some specific clarification in this respect was necessary in order properly to interpret the present FCN Treaty.

Mr. Bassin replied that Article XXIII was not ambiguous concerning the status of these islands, since they were clearly included in other portions of the FCN Treaty. He invited the attention of the Japanese representatives to paragraph 6 of the Protocol in connection with these islands. Their future status, he added, is, of course, one which is not a concern of the FCN Treaty. Mr. Bassin said that he did not believe any useful purpose would be served by attempts to revise the terms of the standard draft to provide for possible contingencies created by the ultimate status of the Ryukyu Islands. Any such contingency, should it materialize, could be dealt with at the time the final settlement of their status occurs.

Mr. Adams added that this Article makes no attempt to define the extent of lands and waters under the sovereignty of either Party, and that it was to be assumed that if, or when, Japan again exercised sovereignty over the Ryukyu Islands or other islands these would then come within the scope of Article XXIII.

Mr. Otabe stated that Japan was already extending preferential customs treatment to products of the Ryukyu Islands imported into Japan. It was anticipated that Japan would extend other specific rights or privileges to the people and the products of the Ryukyus (over which Japan retains residual sovereignty) which would not be accorded to any foreign country. Since such privileges were considered appropriate in view of the relationship of these islands to Japan, it was believed that a specific reservation was needed to ensure that the principle of most-favored-nation treatment would not be invoked by other countries in this connection.

Mr. Singer replied that a reservation in this respect was neither necessary nor appropriate, since it could not be formulated without raising political problems entirely foreign to the FCN Treaty. He suggested that the Japanese representatives consider the drafting of a statement on Japan's intentions concerning the extension of customs or other privileges to the people and products of the Ryukyu Islands. Such a statement, together with an appropriate reply by the American side, could be made of record in the memoranda of conversations on the present informal discussions.

Mr. Otabe added that such a statement would probably be released for public information if no objection were perceived by either side.

Mr. Nagai stated that in addition to special customs treatment for products of the Ryukyu Islands, Japan would probably wish to consider these Islands as coming within the scope of its coastal trading, and might also wish to exempt Ryukyu Islanders from the normal immigration requirements for entry into Japan.

Mr. Yukawa asked for information as to the areas of land and water (other than the continental United States and the areas specifically mentioned in Article XXIII) under the sovereignty or authority of the United States to which the present FCN Treaty would be applicable.

Mr. Adams replied that the non-contiguous territories of the United States include Alaska, the Hawaiian Islands (including Midway) and the following dependencies: Puerto Rico, Guam, the Virgin Islands, Samoa (including Navassa, Tutuila, Swain's and other islands), Wake Island, and various other Pacific Ocean islands (Palmyra, Kure, Kingman Reef, Cornwallis or Johnston, Howland, Baker and Jarvis). With respect to the question on territorial waters Mr. Adams stated that the United States exercises jurisdiction over marginal waters to a distance of three miles (at low-water mark) from its shores.

Mr. Yukawa then stated that it was earnestly requested that the words "and the Trust Territory of the Pacific Islands" be deleted from Article XXIII in order that the present Treaty might apply in general to the Trust Territory in view of:

a. The fact that equal treatment is ensured to members of the United Nations with respect to such strategic areas in accordance with Articles 76 and 83 of the United Nations Charter, to which Japan desires to become a signatory at the earliest possible date;

b. The close relationship that existed between Japan and the said Trust Territory; and

c. The belief that Japanese vessels in distress should be permitted to take refuge in the ports of the Trust Territory.

Mr. Yukawa added that in addition to this revision of Article XXIII, it was suggested that a provision be included in the Protocol to the following effect:

> "It is understood that the present Treaty shall be extended as far as reasonably practicable to the Trust Territory of the Pacific Islands."

Mr. Adams replied that the trusteeship agreement covering the former Japanese mandated islands (i.e., the Marshalls, the Mariannas, the Carolines and others), is a commitment of the United States to the United Nations, whose Security Council is charged with the responsibility for agreements concerning the "stragetic areas". It is inappropriate that a bilateral treaty bind the United States with respect to territories so held in trust in the name of the United Nations, since such a step would in effect commit the United Nations. He added that he believed the Department of State would, in the light of Japan's intention to become one of the United Nations at the earliest practicable moment, give sympathetic consideration to the extension of treatment to Japan, with respect to the Trust Territory, similar to that accorded other

countries, insofar as this was feasible and appropriate. No commitment, of course, could be made concerning the "equal treatment" reserved for the United Nations under their Charter. Mr. Adams further stated that international custom alone sufficied to extend the right of refuge in the Trust Territory to Japanese vessels in distress, and that no modification of the standard draft was necessary to establish this elemental and humane principle.

ARTICLES XXIV, XXV, and XXVI

Mr. Otabe stated that there were no questions at present on the Japanese side with reference to these three Articles. These were under study by the Treaties Bureau (particularly Article XXV in connection with outstanding treaties, on which point that Bureau might desire to express its views). Mr. Otabe added that any comments of the Treaties Bureau would be discussed at later meetings.

ARTICLE XIV

Before opening discussions on the Protocol to the FCN Treaty, Mr. Yukawa stated that there were a few points he wished to raise concerning Articles previously discussed.

With reference to paragraph 1, Article XIV, Mr. Yukawa pointed to the statement reading "Each Party shall accord most-favored-nation treatment to products of the other Party from whatever place...arriving ..." He then asked if this clause would normally cover goods shipped to a third country and then re-exported to the territories of the other Party, whenever these goods had not been processed, modified, improved, or altered in the third country, and whenever the goods were covered by a certificate of origin clearly indicating them to be the product of either Party.

Mr. Nagai added that the customs regulations of some countries specify that certain rights accorded to another country with respect to customs duties were extended only when the goods were shipped directly from the country of origin. It appeared, however, that this requirement of direct shipment was not a part of the treatment provided for in Article XIV, and that goods might be shipped through a third country.

Mr. Singer replied that Mr. Yukawa's and Mr. Nagai's understanding was correct in that direct shipment from Japan to the United States, for example, was not a requisite for receiving customs and other treatment accorded to Japanese goods. It was understood that shipment through a third country would be limited to transit, transshipment, necessary storage and warehousing, et cetera, in that third country, and would not involve further labor or processing to improve or modify the original product. He added that marks of origin, invoices, certificates of origin, and other documentation could be utilized to demonstrate that goods were truly the product of a given country.

ARTICLE XVI

Mr. Yukawa referred to previous discussions on the screen quota system permitted under the GATT, and stated that the Japanese side wished to make a precise and specific reservation to the effect that Japan could implement such a procedure without violating the FCN Treaty provisions.

Mr. Nagai added that the GATT screen quota system (GATT, Article IV, "Special Provisions Relating to Cinematograph Films) were clearly an exception to the national treatment principle. Since Japan desires to implement such a procedure in the near future, and in view of the interest of the United States in this field, it was believed that unnecessary complications would be avoided if this reservation were entered in the most specific terms possible. While contrary to the provisions of Article XVI, the case is a special one, added Mr. Nagai, and it was hoped that the United States would not object to the inclusion of the GATT formula.

Mr. Yukawa proposed therefore that the following paragraph be inserted in the Protocol (between paragraphs 3 and 4):

> "The provisions of Article XVI shall not preclude either Party from applying a screen quota system to exposed cinematograph film similar to that provided for under Article IV of the General Agreement on Tariffs and Trade."

Mr. Adams replied that the Japanese proposal would be transmitted to the Department of State for its comments.

ARTICLE XXI

Mr. Yukawa then referred to previous discussions on paragraph 3, Article XXI, with respect to the situation arising from Japan's present exclusion from the GATT in spite of its strong desire to become a contracting party to the Agreement as soon as practicable. As a result of previous suggestions that consideration be given to leaving paragraph 3 substantially unchanged, and that a clarifying or qualifying clause be drafted, Mr. Yukawa proposed that an additional phrase be inserted at the end of the second sentence, which would then read:

> "Similarly, the most-favored-nation provisions of the present Treaty shall not apply to special advantages accorded by virtue of the aforesaid Agreement as long as either Party, of its own choice, does not adhere thereto."

Mr. Adams stated that Mr. Yukawa's proposal would be referred to the Department of State for its consideration.

PROTOCOL

Mr. Yukawa asked for a clarification of the term "mining on the public domain" as used in paragraph 3 of the Protocol. Mr. Bassin replied that this referred to mining activities on publicly held or Government-owned lands.

Mr. Mori pointed out that either Party reserves its rights concerning the exploitation of natural resources (paragraph 2, Article VII). At the same time, he added, the most-favored-nation treatment principle is established in this connection (paragraph 4, Article VII). He asked for confirmation of his understanding that most-favored-nation treatment would be accorded to mining on non-public lands, not dependent on reciprocity, while mining on public lands could be required to be based on strict reciprocity. In other words, in the latter case, even if Japan granted such rights to nationals of a third country, it was not bound to extend similar rights to American nationals unless such rights were reciprocally granted to Japanese nationals by the United States.

Mr. Bassin replied that Mr. Mori's understanding was correct.

Mr. Nagai then stated that there was no distinction under Japanese law between private lands and public lands with respect to mining. He added that the right of exploitation and disposition of sub-soil mineral resources, whether on private or public lands, could only be granted by the Government.

Mr. Bassin asked whether all mining in Japan could in practice be considered as "on the public domain", since no mining activities could be conducted on privately-owned lands without permission from the Government.

Mr. Kanematsu replied that it could be so considered, in that even a Japanese national could not exploit mineral resources on lands of his ownership without the prior consent of the Government ("The State shall have the power to grant the right to mine and obtain unmined minerals" - Article 2, Japanese Mining Law No. 289, as amended in 1950).

Mr. Adams stated that it appeared that the Japanese interpretation of paragraph 3 of the Protocol was that the rights of aliens to engage in mining on both privately-owned and public lands were dependent on reciprocity. In view of the phraseology employed in this paragraph and in Article VII, it was believed that the Department of State regarded mining on private lands as falling within the scope of the latter Article, while paragraph 3 of the Protocol (and its clause on reciprocity) was limited in scope to mining on public lands. Mr. Adams said that further study would be given this point by the American side, and that the views of the Department of State would be requested.

Mr. Yukawa then stated that the single word "access", as used in paragraph 1 of the Protocol, cannot be properly translated into Japanese. He added that in paragraph 1, Article V, the term "access to the courts" is translatable as a single expression in common use in Japan. In order properly to translate the FCN Treaty, and with a view to assuring that both the English and Japanese texts correspond in terminology as closely as possible, Mr. Yukawa proposed that the wrod "access" in paragraph 1 of the Protocol be deleted and the phrase "access to the courts, administrative tribunals and agencies" be used in its place.

Mr. Bassin replied that there was no objection to this change, and that the working draft of the treaty would be so amended for the present discussions, subject to approval by the Department of State.

Mr. Yukawa asked for a clarification of the terms "legal aid" and "security for costs and judgment", as used in paragraph 1 of the Protocol.

Mr. Bassin replied that legal aid was such aid as is granted either privately or as a governmental function to those persons who are normally unable to acquire legal assistance from private channels. Mr. Bassin stated that in the United States there are many legal aid societies whose function it is to provide legal advice, guidance and assistance to persons who are unable to pay fees to private attorneys. With respect to security for costs and judgment, Mr. Bassin indicated that it was a security which a defendant in a law suit may require of a plaintiff who does not reside within the jurisdiction of the court, for the payment of such costs of judgment as may be awarded to the defendant.

Mr. Yukawa stated that there were some similar legal aids rendered by lawyers or bar societies in Japan, but that it was his understanding that paragraph 1 of the Protocol was not intended to bind such privately rendered legal aids as those by individual lawyers or bar associations. Mr. Bassin replied that this understanding was correct and that, while private legal aid is available in the United States, it was not intended that private legal aid societies be bound by the provisions of the Treaty.

It was then agreed that the next meeting would be held on Tuesday, April 15, 1952, with discussions to continue on the Protocol to the FCN Treaty.

/s/ M. Yukawa

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/s/ Frank A. Waring

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